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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1031

LEONARD TONASKET, APPELLANT

v.

THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (J.S. App. A) is reported at 79 Wash. 2d 607, 488 P. 2d 281. The opinion of the Washington Superior Court (J.S. App. B) is not reported.

JURISDICTION

On November 15, 1971, the Supreme Court of the State of Washington entered final judgment affirming the decision of the State Superior Court (J.S. App. C). Notice of appeal was filed on December 8, 1971 (J.S. App. D). Probable jurisdiction was noted on June 12, 1972. 407 U.S. 908. This Court's jurisdiction rests on 28 U.S.C. 1257(2).

QUESTION PRESENTED

The United States will discuss the following question:

Whether the assumption by the State of Washington of criminal and civil jurisdiction within the Colville Indian Reservation under Public Law 280 [1] authorizes the State to tax retail sales made on the reservation by a member of the Colville Tribe.

INTEREST OF THE UNITED STATES

By order of April 3, 1972, the Court invited the Solicitor General to express the views of the United States in this case. Because of its treaty and trust obligations to reservation Indians the United States is interested in protecting such Indians from diminutions, not expressly authorized by Congress, of their immunities from state taxation. The United States is also concerned that Public Law 280 be interpreted so as to effectuate its purpose.

STATEMENT

Appellant is a Colville Indian of full blood, who owns a store on allotted land held in trust by the United States in the Colville Indian Reservation in the State of Washington. His customers are Indian and non-Indian. App. p. 37.[2] In violation of state law, if it is applicable, appellant did not obtain a license

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[1] Act of August 15, 1953, 67 Stat. 588, *et seq.*, 18 U.S.C. 1162, 28 U.S.C. 1360. The original Act is set forth at J.S. App. E, pp. 2–5. Public Law 280 was amended by the Indian Civil Rights Act of 1968, Act of April 11, 1968, Title IV, 82 Stat. 78, *et seq.*, 25 U.S.C. 1321, *et seq.*

[2] The statement by the Supreme Court of Washington that the "majority are non-Indians" (App. p. 41) does not seem to be supported by the record. Compare App. p. 37.

as a retailer of cigarettes nor affix state cigarette stamps to cigarettes he sold. In February 1967, agents of the State of Washington entered appellant's store, seized the cigarettes he had in stock and arrested him for violation of the state cigarette licensing and tax laws.[3] App. p. 42. Thereafter, appellant brought this suit for a declaratory judgment to establish his right to do business free of regulation or taxation by the State. The Supreme Court of the State of Washington, affirming the judgment of the trial court, held that the Colville Tribe, by submitting itself to the criminal and civil jurisdiction of the State of Washington as authorized by Public Law 280 and RCWA 37.12.021, subjected the Tribe and its members to state sales taxes and business regulations. App. pp. 24–25. Appellant appealed to this Court, which noted probable jurisdiction on June 12, 1972. 407 U.S. 908.

SUMMARY OF ARGUMENT

1. Public Law 280 did not change state powers of taxation within Indian reservations. It was enacted primarily to improve the administration of criminal and civil justice within certain Indian reservations by making state courts and state law enforcement available to the Indians who live there. In authorizing the application of state substantive law within these reservations, the Act provided broad exemptions assuring that Indian tax immunities and the trust status of Indian lands would remain unchanged and that federal statutes concerning the use of reservation land would remain in effect. The legislative history

[3] RCWA 19.91.120; RCWA 82.32.030; RCWA 82.24.050.

of the statute shows that Congress chose not to subsidize States which might choose to assume the jurisdiction provided by Public Law 280 by conferring new taxing powers or by direct subsidy. And the purpose of the statute would be frustrated by freighting a tribe's decision to make use of state courts and law enforcement with a tax consequence unintended by Congress.

2. Applying these principles to the present case, it follows that the State has no authority to tax appellant's sales to Indians. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685. The question of the State's authority to tax appellant's sales to non-Indians is less clear. Moreover, since the decision below, Washington has enacted a new law permitting certain tax-free sales by Indians to non-Indians and the Colville Tribe has passed an ordinance reflecting that law. These changes in the applicable law may well affect the relief to be granted in this suit for a declaratory judgment.

ARGUMENT

I.

PUBLIC LAW 280 DOES NOT CHANGE STATE POWER TO TAX WITHIN INDIAN RESERVATIONS

1. Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 28 U.S.C. 1360, now 25 U.S.C. 1321–1326, is entitled "An Act to confer jurisdiction * * * [on certain States] with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States * * *." It provides that certain States shall have "jurisdiction over offenses committed by or

against Indians in * * * Indian country * * * to the same extent that such State has jurisdiction over offenses committed elsewhere within the State * * *." It further provides that "the criminal laws of such State shall have the same force and effect * * * as they have elsewhere within that State." As to civil jurisdiction, the Act provides that certain States shall have "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country [within such States] * * * to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within that State." 25 U.S.C. 1321(a); 1322(a). Each of these grants of jurisdiction, however, is followed by an extensive proviso prohibiting among other things the alienation or taxation of trust property whether real or personal or the regulation of such property in a manner inconsistent with any federal treaty, agreement, statute or regulation. 25 U.S.C. 1321(b); 1322(b). The Act also preserves the authority of tribal ordinances and customs "if not inconsistent with any *applicable* civil law of the State * * *." 25 U.S.C. 1322(c) (emphasis supplied). The Act is thus quite different from termination legislation which ends federal supervision over a tribe and terminates the benefit of federally provided tax exemptions. Compare 25 U.S.C. 891–902 (the Menominee Termination Act), especially 25 U.S.C. 898, 899. See also *Menominee Tribe* v. *United States,* 391 U.S. 404.

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The Act originally applied only within the States of California, Minnesota, Nebraska, Oregon and Wisconsin, but it permitted other States, by subsequent affirmative action, also to assume jurisdiction under its provisions. The consent of the Indians affected was not required. Public Law 280, Sections 6 and 7. See J.S. App. E, p. 5. In 1968, the Act was amended to provide that thereafter a State could assume the jurisdiction authorized by the Act only "with the consent of the * * * tribe occupying the particular Indian country" affected, in the form of a majority vote of the enrolled adult Indians affected. 82 Stat. 78, *et seq.*, 25 U.S.C. 1321(a), 1322(a), 1326.

The House Report on H.R. 1063, which became P.L. 280, speaks of the bill as part of a series of measures withdrawing federal responsibility for Indians (H. Rep. No. 848, 83d Cong., 1st Sess., p. 3; S. Rep. No. 699, 83d Cong., 1st Sess. p. 3),[4] but makes it clear that Public Law 280 itself is a more modest solution to a more specific problem, the inadequacy of law enforcement and of the adjudication of civil conflicts in some areas of Indian country (H. Rep., *supra*, p. 6):

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could

[4] The House Report was adopted by the Senate Committee as its report as well. References are to the House Report.

> best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.
>
> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

That the Act was considered primarily an authorization of state court jurisdiction, and not an abolition of federal supervision of Indians or the ending of Indian tax immunities, is also suggested by this Court's reference to the Act in *Kennerly* v. *District Court of Montana*, 400 U.S. 423, as an "extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country" (*id.* at 427) and the Court's reference to the 1968 amendments as "a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving Indians arising in Indian country" (*id.* at 428).

Moreover, there is no indication in the committee reports or debates on the bill that Congress intended the Act's conferral of civil and criminal jurisdiction to extend the States' power to tax Indians, although if this were intended it would have been a matter of sufficient importance to evoke discussion within Congress and opposition from the tribes. To the contrary,

the Act's legislative history affirmatively shows that Congress intended not to subsidize the States for exercising criminal and civil jurisdiction within reservations, either by federal payment or by authorizing increased taxation of Indians. In the hearings before the House Subcommittee on Indian Affairs on June 29, 1953, the substitute bill which had been prepared by the Bureau of Indian Affairs and which became Public Law 280 was discussed by Mr. Sellery of the Bureau of Indian Affairs and Congressman Young of Nevada. After Congressman Young asked whether under the substitute bill the States would be subsidized, the following colloquy occurred.[5]

> Mr. Sellery. * * * Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and it is a problem which the States should deal with and accept without Federal financial assistance; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from

[5] The records of this hearing are in the National Archives and are not available without the approval of the House Committee on Interior and Insular Affairs. With the approval of the counsel of the Committee we are lodging a transcript of the pertinent part of the hearings with the Clerk and we are transmitting copies to the parties and *amici*.

other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

Mr. Young. That would not quite be true, though; would it? Because for the most part he does not pay any taxes.

Mr. Sellery. No. There is that difference.

Mr. Young. A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

Mr. Sellery. The Indians, of course, do pay other forms of taxes. I do not know how the courts of Nevada are supported financially, but the Indians do pay the sales tax and other taxes.

Mr. Young. But no income tax or corporation tax or profits tax. You understand a large portion of the land is held in trust and therefore is not subject to tax.

Mr. Sellery. That is correct.

Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.

[Daily transcript of Hearing pp. 8–10].

The lack of compensation for States assuming the new jurisdiction was again referred to in the hearings before the full committee on July 15, 1953:

> Mr. Abbott. * * * The other states not included, such as Mr. Young's state, Nevada, have indicated unwillingness and they have good reasons, I believe * * *. [p. 7]
>
> * * * * * *
>
> Mr. Young. Mr. Chairman, did you say Nevada. I object to Nevada, because only 15 percent of our state is owned by the state and 85 percent is owned by the Federal Government.
>
> Mr. D'Ewart. All right, California, Minnesota, Nebraska, Oregon, and Wisconsin. Washington is also excluded. [p. 17]

Thus, the clear (though never precisely stated) premise for the Act's conferral of jurisdiction directly on certain named States whose representatives did not object, while authorizing optional assumption of jurisdiction by other States, was that no addition to state revenues would result from exercise of jurisdiction under the Act. This premise is partially reflected in the Act's provisions specifically assuring that Indian property tax immunities shall not be affected:[6]

> Section 2: (b) [25 U.S.C. 1321(b)] Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or per-

[6] Indian tax immunities result largely from the trust status of Indian land and treaties reserving such land. *Squire* v. *Capoeman*, 351 U.S. 1; *United States* v. *Rickert*, 188 U.S. 432; *The Kansas Indians*, 5 Wall. 737. They are to be liberally construed in favor of immunity and against implied repeal. *Choate* v. *Trapp*, 224 U.S. 665, 675.

sonal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof [emphasis added].

Section 4: (b) [25 U.S.C. 1322(b)] Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; * * * [emphasis added].

While the Act thus specifically refers to property taxation (the most prominent, but not the only, area of Indian tax immunity), these provisos are, in our view, merely illustrative of the general understanding expressed in the legislative history that Public Law 280 would not affect state power to tax Indians.

2. Indeed, it would tend to frustrate the purpose of Public Law 280, as amended, if tax consequences were to be appended to an election by a tribe to come under state criminal and civil jurisdiction. This is illustrated by the facts of this case.

Washington is not one of the States named in Public Law 280 for immediate conferral of jurisdiction. In 1957, Washington enacted a law purporting to assume over Indian country within the State all jurisdiction permitted by Public Law 280. Enacted Laws 1957, ch. 240, sec. 1, p. 941; see RCWA 37.12.010 Legislative History. This law was amended in advance of the 1968 amendment to Public Law 280 to provide that without Indian consent the State would have jurisdiction within reservations over certain subjects (restricted largely to family relations and motor vehicle registration), but that to reach the full extent of jurisdiction permitted by Public Law 280 the consent of the tribe would be required. RCWA 37.12.010, 37.12.021.[7] The amendment repeated the limitations of Sections 2(b) and 4(b) of Public Law 280 (see pp. 10–11 *supra*) and further provided that the Washington Act shall be subject to the limitations of the federal Act. RCWA 37.12.060, 37.12.070, 37.12.050.

On January 13, 1965, in accordance with the Washington Act, the Colville Tribe adopted a resolution requesting the State to assume criminal and civil jurisdiction within the reservation, and the governor of the State issued a proclamation under RCWA 37.12.021 assuming such jurisdiction (J.S. App. Ap. 5).

[7] We do not comment here on the validity of partial assumptions of jurisdiction prior to the 1968 amendments to Public Law 280.

There is nothing to indicate that the State in making its judicial process available to the Tribe or the Tribe in choosing to submit to it believed that the Tribe and its members were thereby assuming additional tax burdens. If the Tribe had suspected that in submitting its members to state jurisdiction it thereby subjected them to state taxation in areas previously immune, it might well have refused to submit to state jurisdiction.

Moreover, since the 1968 amendment to Public Law 280 requires a majority vote of the enrolled adult Indians before a tribe can submit to state jurisdiction (see p. 6. *supra*), the imposition of state taxes as a consequence of that choice would, throughout the nation, seriously discourage any further elections in favor of state jurisdiction under Public Law 280. This could be particularly unfortunate because the poorest tribes, which often are most in need of state judicial services, can least afford increased taxation. Thus, the statutory purpose, as well as the legislative history previously discussed, supports our view that Public Law 280 has no tax consequences.

3. Our view of the congressional intent is reasonable with respect to the States as well as to the tribes. Merely because a State undertakes to provide judicial services within an Indian reservation, it does not follow that fairness requires that it also be given new taxing authority within the reservation. The States already have substantial sources of income attributable to Indians. Without requiring any particular service from the States, Congress has since 1924 permitted them to tax Indian mineral holdings, 42 Stat. 244, 25 U.S.C. 398, which have often been the only substantial wealth on land noted for its poverty.

Though it is of less significance, Congress has also, without requiring any specific service for the Indians, allowed State gasoline and motor fuel taxes to be imposed on all sales within Indian reservations. 4 U.S.C. 104, 109. Moreover, a substantial part of the goods purchased by Indians living within a reservation are ordinarily purchased outside the reservation where the purchases are subject to state sales taxes without regard to the substantiality of services rendered the purchaser by the State.

Additionally, the Indians subject to state jurisdiction under Public Law 280 remain the beneficiaries of all federal programs for Indian development that would otherwise be available except those concerning crime prevention and law enforcement. Considerable sums are annually expended by the federal government on such programs for tribes which have become subject to state criminal and civil jurisdiction. The Bureau of Indian Affairs, for example, expended $14,072,394 during fiscal year 1971 in California,[8] although Public Law 280 subjected all Indian country within that State to state criminal and civil jurisdiction. The only major category of assistance omitted is "maintaining law and order." These and other programs substantially reduce state responsibilities for providing services to reservation Indians and justify immunities from state taxes which would siphon off resources supplied by the federal government for the

[8] Report of expenditures in fiscal year 1971 from budget submission for fiscal year 1973, supplied to us by the Department of the Interior.

benefit of the Indians and income earned by the Indians who remain on reservations and under federal protection.

It was thus not unreasonable and certainly within Congress' authority in enacting Public Law 280 to choose not to give additional taxing power to States which elect to make their judicial process available to reservation Indians.

II

IT FOLLOWS THAT THE STATE MAY NOT TAX APPELLANT'S SALES TO INDIANS AND THAT THE RELIEF TO BE GRANTED IN THIS DECLARATORY JUDGMENT SUIT WITH RESPECT TO APPELLANT'S SALES TO NON-INDIANS MAY WELL BE AFFECTED BY RECENT CHANGES IN APPLICABLE STATE AND TRIBAL LAW

1. The appellant is a full-blooded enrolled member of the Colville Confederated Tribe. His store is located on the Colville Reservation. A portion of his sales are to Indian residents of the reservation. Public Law 280 does not end federal supervision of trading with Indians on Indian reservations.[9] It makes state civil laws applicable within the reservation only if they are "of general application" (25 U.S.C. 1322(a))

[9] The Department of the Interior has interpreted Public Law 280, which it primarily drafted, as not ending its supervision of trading with Indians on reservations subject to the Act. Although traders have not been licensed for the Colville reservation, we were incorrect in stating in our prior memorandum in this case that licenses had not been required in the State of Washington. See Memorandum pp. 3, 7, 8. In fact, traders have been licensed for the Quinault and Quileute Reservations, both of which are subject to State jurisdiction under Public Law 280.

and thus leaves unchanged the established principle that federal law pre-empts state regulations designed to meet the particular problems of Indian trading. See *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685, 690–692. Moreover, as this Court stated in *Metlakatla Indians* v. *Egan,* 369 U.S. 45, 56 "[Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation * * *." See pp. 10–11, *supra.*

Because the appellant is a full-blooded Indian, he cannot be required to have a license to trade with Indians. 25 U.S.C. 264. He is, however, a person residing on an Indian reservation trading therein within the meaning of 25 U.S.C. 264.[10] In *Warren Trading Post* v. *Arizona, supra,* this Court invalidated the imposition by the State of Arizona of a gross income tax even on a non-Indian licensed by the federal government to trade on the Navajo Reservation, at least insofar as the tax was applied "with respect to sales made to reservation Indians on the reservation * * * " (380 U.S. at 691–692). The Court held that " * * * the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." 380 U.S. at 691. If the Court agrees with

[10] For the federal regulations concerning trade with Indians on Indian reservations, see generally 25 C.F.R. 251.1–251.26.

our submission (point I, *supra*) that state power to tax is unchanged by Public Law 280, it follows that the taxes of the State of Washington at issue in this case are invalid insofar as they apply to sales to Indians residing on the Reservation.

2. Appellant contends that his sales to non-Indians are also exempt from state taxation. We express no view on this issue, but wish to point out certain considerations that may be of assistance to the Court.

a. Ordinarily Indian traders are not required to distinguish between sales to Indians and sales to non-Indians. The trading posts are in Indian country and are under federal supervision as to all sales. It would be an unwarranted administrative burden to require them to operate under a dual system of licensing and sales. Here the factual situation is peculiar because appellant's sales to non-Indians are a major part of his activity. And, apparently, a major part of those sales are of cigarettes—a product in no way connected with reservation production or manufacture.

b. This is a suit for a declaratory judgment setting forth the appellant's right to do business free of state licensing [11] or taxation. Since the decision below, there

[11] The State's requirement of a license for selling cigarettes (R.C.W.A. 19.91.120) appears to be a civil regulatory law of general application. If, as also appears, its only regulatory purpose is to assist in administering the State's revenue laws, the validity of its application to appellant's sales to non-Indians would in our view be dependent on the issue of the validity of the application of the taxes at issue here to those sales. Under 25 U.S.C. 264 and *Warren Trading Post* (both discussed *supra*, p. 16), the State cannot impose a licensing requirement with respect to appellant's sales to Indians.

have been two significant changes in the state and tribal laws affecting the appellant which have an important bearing on state taxation of appellant's sales to non-Indians, but which have not been considered by the courts below:

(1) On February 28, 1972, the State of Washington amended its laws concerning the taxation of cigarettes to permit Indians such as the appellant to possess unstamped cigarettes and to permit residents of the State to buy up to 400 cigarettes (two cartons) at any time without incurring state tax liability. 1972 Session Laws of the State of Washington, 2nd Extraordinary Session, 42nd Legislature, Chapter 157, Sections 6 and 7 (pp. 522–523) (reprinted in Appellant's Brief, pp. A–39 to A–41). See also the governor's message vetoing a portion of the law that might have required the State to approve Indian sellers. *Id.* at 523–525 (Appellant's Brief, pp. A–41 to A–43).

(2) In apparent cooperation with this change in state law, the Colville Tribe has passed an ordinance restricting sales of cigarettes to non-Indians to two cartons at any time. Appellant's Brief, pp. A–23 to A–28. Resolution 1972–375 enacted by the Colville

Business Council June 23, 1972, approved by the Secretary of the Interior, October 25, 1972, to appear in the Federal Register. Thus, while the issues in this case apparently remain alive with respect to past sales to non-Indians, a quite different situation may now exist with respect to more recent and future sales. These changes in the applicable law are relevant to the relief to be granted in the present suit for a declaratory judgment.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed and the case remanded for further consideration.

Respectfully submitted.

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